the public interest requires blind competition, at least so far as knowledge of future transactions is concerned. The giving of advice based on reports of future plans of the members was probably the final weight in tipping the scale. If no such plan is conducted and each individual member is forced to rely on his own judgment in interpreting the reports of past transactions, the activities of such an association may be permitted.[30]

Today's business requires scientific management and should not be forced to grope in the dark. The test to be applied to business methods can only be determined by the results of past regulation measured by economic standards. A *laissez-faire* policy is indeed attractive unless we can foresee a certainty of injury to those primarily to be considered in protective measures.

PRICE MAINTENANCE AND THE BEECHNUT DECISION

In *Federal Trade Commission v. Beechnut Packing Co.* (1922) 42 Sup. Ct. 150, the Supreme Court sustained the authority of the Federal Trade Commission to issue an order requiring a manufacturer to desist from carrying out a certain plan of resale of its branded products by which standard prices were maintained. In pursuance of this plan the company let it be generally known that it would refuse to sell to any jobbers, wholesalers, or retailers who failed to observe the resale prices specified, and devised an elaborate system to ascertain what dealers were not complying. The Federal Trade Commission condemned this as an unfair method of competition within the meaning of section 5 of the Federal Trade Commission Act.[1] There was no suggestion that the defendant had any sort of monopoly in the kinds of products which it manufactured.

QUART. 217, 234; Notz, *The Webb-Pomerene Law* (1919) 29 YALE LAW JOURNAL, 29; Levy, *The Sherman Law and the English Doctrine* (1920) 6 CORN. L. QUART. 36, 45.

[30] *United States v. American Linseed Co.* (1921, N. D. Ill.) 275 Fed. 939. The facts are similar except that no advice or future predictions as to market conditions were given. The association was held legal in the lower court under the Sherman Act. See comment on case (1921) 54 CHIC. LEG. NEWS, 125.

[1] Act of Sept. 26, 1914, ch. 311, sec. 5 (38 Stat. at L. 719). "That Act declares unlawful 'unfair methods of competition' and gives the Commission authority after hearing to make orders to compel the discontinuance of such methods. What shall constitute unfair methods of competition denounced by the Act is left without specific definition." From the principal case, 42 Sup. Ct. at p. 154.

"It is clear that this, like the Sherman Act, merely operates as a general license to the federal courts, when cases are presented within the federal jurisdictional subject of interstate and foreign commerce, to declare or make the law as to what are illegal methods of competition and what are not, according to the usage customarily adopted by common law courts, i. e., by applying the rule of reason." Kales, *Contracts & Combinations in Restraint of Trade* (1918) 140; see also Haines, *Efforts to Define Unfair Competition* (1919) 29 YALE LAW JOURNAL, 1.

The Supreme Court's decisions on the subject of resale price maintenance by a manufacturer who distributes his products through jobbers, wholesalers, and retailers, may be briefly summarized as follows:

1. A manufacturer who sells his products to dealers with contracts or agreements that specified resale prices shall be observed cannot enforce them and has no remedy against the dealer or against third parties who knowingly procure a breach. Such contracts are void as against public policy. *Dr. Miles Medical Co. v. John D. Park & Sons Co.*[2]

2. A manufacturer who sells his products to dealers without contracts or agreements as to resale prices is not guilty of an offence under the Sherman Act,[3] prohibiting monopolies, contracts, combinations, and conspiracies in restraint of interstate commerce, where he merely indicates his wishes as to resale prices and announces that he will not sell to any distributor who fails to observe them. He has the undoubted privilege of refusing to deal with anyone who does not comply, although this results in the maintenance of the desired price. An indictment which fails to charge the making of any agreement, express or implied, importing an obligation to observe such prices, is therefore demurrable. *United States v. Colgate & Co.*[4]

3. But a manufacturer who sells his products to dealers *with* contracts or agreements as to resale prices (void though they are) *is* guilty of an offence under the Sherman Act. Such contracts or agreements need not be express but may be implied from a course of dealing or other circumstances. *United States v. A. Schrader's Son, Inc.*[5]

An agreement may not, however, be inferred from the mere fact that the manufacturer has indicated a sales plan fixing minimum resale prices, in the maintenance of which the dealers actually co-operate, whether from choice or from fear of being cut off from the list of dealers. *Frey & Son v. Cudahy Packing Company.*[6]

4. Finally, in the instant case, it has been held that a manufacturer may be guilty of unfair methods of competition under the Federal Trade Commission Act (the same principles of public policy applying as in cases under the Sherman Act[7]) in the absence of any contract or agreement, express or implied, where for the purpose of maintaining standard resale prices he has systematically refused to sell to dealers who have not observed those suggested.

The original announcement, in the *Miles* case, of the Supreme Court's view that contracts for the maintenance of uniform resale prices

---

[2] (1911) 220 U. S. 373, 31 Sup. Ct. 376.

[3] Act of July 2, 1890, ch. 647 (26 Stat. at L. 209).

[4] (1919) 250 U. S. 300, 39 Sup. Ct. 465. See (1920) 29 YALE LAW JOURNAL, 365. See also (1919) 28 YALE LAW JOURNAL, 505.

[5] (1920) 252 U. S. 85, 40 Sup. Ct. 251. See (1920) 29 YALE LAW JOURNAL, 696.

[6] (1921) 256 U. S. 208, 41 Sup. Ct. 451.

[7] See *supra* note 1.

are against public policy aroused a considerable degree of adverse criticism.[8] The doctrine was nevertheless firmly adhered to.[9] The decision in the *Schrader* case that the making of such contracts was an indictable offence under the Sherman Act, was the next step. The chief difficulty encountered in reaching this decision was the *Colgate* case, which was distinguished, however, in that the indictment, as interpreted by the trial court, failed to charge the existence of contracts or agreements, express or implied, between the manufacturer and the dealers. But the Sherman Act declares unlawful not only contracts but combinations and conspiracies in restraint of interstate commerce, and in another section, monopolies and attempts to monopolize. One person cannot, of course, combine or conspire. But one person can monopolize or attempt to monopolize. And if the dealers acquiesce, whether from willingness or from fear, the end desired by the manufacturer and condemned by the Supreme Court is attained. Indeed, if the defendant manufacturer in the *Schrader* case actually succeeded in maintaining standard resale prices, it was not by means of the contracts with his dealers, which were void and unenforceable, but by the other method of refusing to sell to non-complying dealers.[10] Notwithstanding this logical difficulty, the

---

[8] In that case the court quoted Justice Lurton (then Circuit Judge) in the opinion of the Circuit Court of Appeals in the case of *John D. Park & Sons Co. v. Samuel B. Hartman* (1907) 153 Fed. 24, 42, as follows: "Next, all competition between retailers is destroyed, for each such retailer can obtain his supply only by signing one of the uniform contracts prepared for retailers, whereby he covenants . . . . not to sell at less than a standard price named in the agreement. . . . . Thus a combination between the manufacturer, the wholesalers and the retailers to maintain prices and stifle competition has been brought about." 220 U. S. 373, 399, 31 Sup. Ct. 376, 381.

This reasoning would clearly be sufficient to sustain the principle that such contracts are against public policy where the commodity is a necessity of which the particular manufacturer has some considerable degree of monopoly. But where there is no monopoly of the product, there is nothing to prevent the operation of the usual economic laws in establishing a fair price. The manufacturer necessarily has a monopoly of his own brand of the product; but his brand must come into competition with other brands of other manufacturers. It is a curious doctrine that it is against public policy for him to fix the retail price of his own goods. The door is thereby opened to methods of competition among retailers which are in the long run truly harmful to the public—predatory price cutting for the purpose of driving the weaker rivals out of business. See Kales, *Contracts & Combinations in Restraint of Trade* (1918) ch. 4. See also dissenting opinion of Justice Holmes in the *Miles* case, *supra* note 2, at p. 409, 31 Sup. Ct. at p. 385. For the arguments on both sides from the economic point of view, see Murchison, *Resale Price Maintenance* (1919) *Columbia University Studies in Political Science*, Vol. 82, No. 2; Gleick, *Price Maintenance* (1917) 24 CASE & COMMENT, 193.

[9] See *Boston Store of Chicago v. American Graphophone Co.* (1918) 246 U. S. 8, 21, 38 Sup. Ct. 257, 259.

[10] "It is a little difficult, logically, to preceive why an invalid stipulation in a contract could become a contract in restraint of trade, although one can readily see why a combination or conspiracy using invalid agreements might result in such

Supreme Court bound itself to what the trial court called a "distinction without a difference":[11] where contracts or agreements, express or implied, existed, as in the *Schrader* case, the Sherman Act was violated; where they did not exist, as in the *Colgate* case, the Sherman Act was not violated.

In the *Beechnut* case it was expressly stipulated in the agreed statement of facts upon which the decision was based, "that the merchandising conduct of respondent heretofore defined and as herein involved does not constitute a contract or contracts whereby resale prices are fixed, maintained, and enforced." As pointed out by Mr. Justice McReynolds, dissenting, this brought the case clearly within the *Colgate* decision and clearly outside the *Schrader* decision. Yet the court sustained an order prohibiting the continuance of the conduct in question, without overruling or questioning the *Colgate* case, or recognizing any inconsistency in the two positions. The basis of the decision was that the methods used by the manufacturer in the instant case were "quite as effectual as agreements, express or implied, intended to accomplish the same purpose"[12]—a rather delayed recognition of what the trial court had pointed out in the *Schrader* case.[13]

The Supreme Court doctrine that the maintenance of standard resale prices of branded products is against public policy, although the manufacturer has no monopoly of the kind of products involved, is open to

---

a violation [of the Sherman Act]." *United States v. A. Schrader's Son, Inc.* (1920 N. D. Ohio) 264 Fed. 175, 180.

[11] "The tacit acquiescence of the wholesalers and retailers in the prices thus fixed is the equivalent for all practical purposes of an express agreement." *United States v. A. Schrader's Son, Inc., supra* at p. 183. The court then reasoned in substance as follows: The *Colgate* case recognizes the manufacturer's privilege of refusing to sell to one who does not observe suggested resale prices. It is a distinction without a difference to say that he may do so by subterfuges and devices without violating the Sherman Act; and yet if he had done the same thing in the form of a written agreement he would be guilty of a violation of the law. "Manifestly, therefore, the decision in the *Dr. Miles Medical* case must rest upon some other ground than the mere fact that there were agreements between the manufacturers and the wholesalers. . . . . There must be a purpose to create and maintain a monopoly, and the acts charged in the indictment must be sufficient to show that there was effective means adopted to create and maintain a monopoly."

Since no such monopoly or attempt at a monopoly was charged, the District Court sustained a demurrer to the indictment. This decision the Supreme Court reversed, saying: "It seems unnecessary to dwell upon the obvious difference between the situation presented when a manufacturer merely indicates his wishes concerning prices and declines further dealings with all who fail to observe them, and one where he enters into agreements—whether express or implied from a course of dealing or other circumstances—with all customers throughout the different States which undertake to bind them to fixed resale prices." 252 U. S. at p. 99, 40 Sup. Ct. at p. 253.

[12] 42 Sup. Ct. at p. 155.

[13] See *supra* note 11. See also NOTES (1919) 19 COL. L. REV. 149, and see also NOTES (1920) 33 HARV. L. REV. 966.

question.[14] But once having adopted this doctrine, the decision in the *Beechnut* case simply carries it to its logical conclusion. No sound distinction can be based upon the presence or absence of "contracts" or "agreements."[15] Furthermore, there is no inconsistency in recognizing the bare privilege of refusing to sell in general, while denying that it can be exercised as a means toward what has been assumed to be an undesirable end. The logical difficulty of the present decision lies in the continued, unqualified support of the *Colgate* case, and in the necessary inference that a manufacturer still has the privilege, which the court said he had in that case, "to exercise his own discretion as to those with whom he would deal, and to announce the circumstances under which he would refuse to sell,"[16] although the "circumstance" announced be failure of the dealer to comply with specified resale prices. The only distinction which the court suggests is that "the Beechnut system[17] goes far beyond the *simple* refusal to sell goods to persons who will not

---

[14] See *supra* note 8. See also dissenting opinion of Mr. Justice Holmes in the principal case: "So far as the Sherman Act is concerned I had supposed that its policy was aimed against attempts to create a monopoly in the doers of the condemned act or to hinder competition with them. Of course there can be nothing of that sort here. The respondent already has the monopoly of its own goods with the full assent of the law, and no one can compete with it with regard to those goods, which are the only ones concerned. . . . . I cannot see how it is unfair competition to say to those to whom the respondent sells and to the world, you can have my goods only on the terms that I propose, when the existence of any competition in dealing with them depends upon the respondent's will." 42 Sup. Ct. at p. 155. And as suggested by Mr. Justice McReynolds: "If a manufacturer should limit his customers to consumers, he would thereby destroy competition among dealers, but neither they nor the public could complain." 42 Sup. Ct. at p. 156.

[15] See NOTES (1919) 19 COL. L. REV. 149; NOTES (1920) 33 HARV. L. REV. 966. But Cf. Brown, *The Right to Refuse to Sell* (1916) 25 YALE LAW JOURNAL, 194.

[16] From the opinion of the court in the principal case at p. 155.

[17] The nature of the system condemned appears from the opinion of the court giving approval to an order requiring "the company to cease and desist from carrying into effect its so-called Beech-Nut policy by co-operative methods in which the respondent and its distributors, customers, and agents undertake to prevent others from obtaining the company's products at less than the prices designated by it—(1) by the practice of reporting the names of dealers who do not observe such resale prices; (2) by causing dealers to be enrolled upon lists of undesirable purchasers who are not to be supplied with the products of the company unless and until they have given satisfactory assurances of their purpose to maintain such designated prices in the future; (3) by employing salesmen or agents to assist in such plan by reporting dealers who do not observe such resale prices, and giving orders of purchase only to such jobbers and wholesalers as sell at the suggested prices and refusing to give such orders to dealers who sell at less than such prices, or who sell to others who sell at less than such prices; (4) by utilizing numbers and symbols marked upon cases containing their products with a view to ascertaining the names of the dealers who sell the company's products at less than the suggested prices, or who sell to others who sell at less than such prices in order to prevent such dealers from obtaining the products of the

sell at stated prices, which in the *Colgate* case was held to be within the legal rights of the producer."[18] But whatever the present status of the *Colgate* case, one thing seems clear—the passage to the legal methods of that case, which the court has assumed to preserve between the Scylla and Charybdis of the subsequent decisions, is narrow and dangerous, and the manufacturer who would take advantage of the passage will need a truly skilful pilot.

NULLIFICATION OF THE REFERENDUM BY LEGISLATIVE DECLARATION OF EMERGENCY

Shall the Supreme Court say that the Legislature has deliberately told a falsehood? This problem is troubling several states in connection with their initiative and referendum constitutional amendments, which provide that emergency measures necessary for the immediate preservation of the public peace, health, and safety shall not be subject to the referendum.[1] The issue is whether the court may go behind a legislative declaration of emergency, attached to an act, so as to decide whether the act is really referable to the people or not.

A distinction of some value may be drawn between a declaration of emergency that merely abridges the time in which a statute shall go into effect and one the purpose of which is also to prevent a popular referendum.[2] Many state constitutions provide that all laws shall take effect

---

company; or (5) by utilizing any other equivalent co-operative means of accomplishing the maintenance of prices fixed by the company." 42 Sup. Ct. at p. 155.

It is difficult to see anything in the methods enumerated more unlawful than in the "simple" methods of the Colgate Company. As put by Mr. Justice McReynolds, dissenting: "Having the undoubted right to sell to whom it will, why should respondent be enjoined from writing down the names of dealers regarded as undesirable customers? Nor does there appear to be any wrong in maintaining special salesmen who turn over orders to selected wholesalers and who honestly investigate and report to their principal the treatment accorded its products by dealers. Finally, as respondent may freely select customers, how can injury result from marks on packages which enable it to trace their movements? The privilege to sell or not to sell at will surely involves the right by open and honest means to ascertain what selected customers do with goods voluntarily sold to them." 42 Sup. Ct. at p. 156.

[18] 42 Sup. Ct. at p. 154. (Italics ours.)

[1] The following is a typical constitutional provision: "The second power reserved by the people is the referendum, and it may be ordered on any act, bill, law or any part thereof, passed by the Legislature, except such laws as may be necessary for the immediate preservation of the public peace, health, or safety, support of the state government and its existing public institutions." Wash. Const. sec. 1, art. 2, subd. b, amendment 7.

[2] The first merely increases the enacting power of the state legislature; the second operates in addition to infringe upon the reserved power of the people to nullify the act by a referendum. *State v. Stewart* (1920) 57 Mont. 144, 187 Pac. 641. See (1920) 5 MINN. L. REV. 82. As to the effect of one clause upon the other, see *In re Interrogatories by the Governor* (1919) 66 Colo. 319, 181 Pac. 197.